No. 90-1014

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In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, ET AL., PETITIONERS

v.

DANIEL WEISMAN, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether government accommodation of religion in civic life violates the Establishment Clause, absent some form of government coercion.

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INTEREST OF THE UNITED STATES

The School Committee of Providence, Rhode Island, has for many years permitted principals to include invocations and benedictions in the city's junior high and high school graduation ceremonies. The courts below held that this practice violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment.

The United States has a significant interest in this case. The United States is authorized to operate primary and secondary schools for military and foreign service dependents under certain circumstances (10 U.S.C. 7204 (Navy); 20 U.S.C. 241 (federal property); 20 U.S.C. 926 (Defense Department); 22 U.S.C. 2701 (foreign service); and for Native Americans (25 U.S.C. 271-304b). The resolution of this case will bear directly on the operation of these schools.

In addition, the United States conducts numerous public ceremonies in which religion is acknowledged in some manner. Many of these ceremonies—presidential inaugurations, for example—date back to the founding of the Republic. These traditions, which the United States has a profound interest in preserving, could be called into question under the broader implications of the decisions below.

The United States has participated as a party or as amicus curiae in numerous cases arising under the Establishment and Free Exercise Clauses, most recently in *Board of Education* v. *Mergens*, 110 S. Ct. 2356 (1990), and *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573 (1989). See also briefs amicus curiae filed in *Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986); *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); and briefs filed as a party in *United States* v. *Lee*, 455 U.S. 252 (1982), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

STATEMENT

1. Each year, junior and senior high schools in Providence, Rhode Island, hold graduation ceremonies for students and their families. For many years, it has been the custom to invite local members of the clergy to deliver invocations and benedictions at these ceremonies. In advance of the ceremonies, clergy members are provided by the school system with a pamphlet entitled "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews. The guidelines recommend that the prayers for such nonsectarian occasions be composed with "inclusiveness and sensitivity." Pet. App. 19a.

This case arose as a result of the June 1989 graduation ceremony conducted at one of the city's junior high schools, the Nathan Bishop Middle School.[1] As in years past, the ceremony took place at the school, and in the course of the ceremony a member of the clergy—on this occasion Rabbi Leslie Gutterman of Temple Beth El of Providence—delivered an invocation and a benediction. Rabbi Gutterman's invocation and benediction both referred to God. Pet. App. 19a-20a & nn. 2-3.

Respondent's daughter, Deborah Weisman, was among the graduating students who attended Nathan Bishop's 1989 ceremony. She is now attending the city's Classical High School. Pet. App. 20a-21a.

2. Daniel Weisman sued petitioners in district court, alleging that the inclusion of invocations and benedictions in graduation ceremonies at the city's public junior high and high school graduation ceremonies violated the Establishment Clause of the First Amendment as applied to the States through the Fourteenth Amendment. The district court entered judgment in favor of Weisman on the basis of stipulated facts and issued a permanent injunction "enjoin[ing] [petitioners] from authorizing or encouraging the use of prayer in connection with school graduation or promotion exercises." Pet. App. 31a.[2]

Reviewing the challenged practice under *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the court determined

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[1] Like the city's other public school graduation ceremonies, the Nathan Bishop Middle School ceremony was sponsored by the Providence School Committee and the superintendent of the Providence School Department. The Committee and Superintendent generally leave the planning of each school's ceremony to the school principal, and they permit, but do not require, the ceremonies to include invocations and benedictions. It is the Assistant Superintendent of Schools who provides principals with the "Guidelines for Civic Occasions" pamphlet. Pet. App. 19a-20a; see also Agreed Statement of Facts 3-4, 9-11, reproduced in Br. in Opp. App. A2-A4, A8-A10.

[2] The court had previously refused to issue a temporary restraining order preventing the inclusion of an invocation and benediction at Nathan Bishop's 1989 graduation ceremony. Pet. App. 19a-20a.

that it failed the "second prong of the *Lemon* [analysis]." Pet. App. 23a. In the court's view, inclusion of a benediction and invocation at graduation ceremonies had the impermissible effect of advancing religion in two ways. First, it "present[ed] a 'symbolic union' of the state and schools with religion and religious practices." *Id.* at 24a. Second, it "convey[ed] a tacit preference for some religions, or for religion in general over no religion at all." *Id.* at 25a. The court viewed its determination that ceremonial invocations and benedictions impermissibly endorse religion as "a foregone conclusion; that is, the reference to a deity necessarily implicates religion." *Ibid.*[3]

The court refused to follow *Stein* v. *Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). In *Stein*, the Sixth Circuit held that invocations and benedictions in public school graduation ceremonies are not per se unconstitutional. The *Stein* court had relied upon *Marsh* v. *Chambers*, 463 U.S. 783 (1983), in which this Court upheld against an Establishment Clause challenge the Nebraska legislature's practice of opening each day's session with a prayer offered by a paid chaplain. The district court here rejected the approach in *Stein*, concluding that the "*Marsh* holding was narrowly limited to the unique situation of legislative prayer" and thus did not apply to similar religious references at graduation ceremonies. Pet. App. 27a. The court concluded by indicating that invocations and benedictions would be acceptable, but only if they omitted any reference to a deity. *Id.* at 28a-29a.

3. A divided panel of the First Circuit affirmed. Pet. App. 1a-17a. Writing for the majority, Judge Torruella found nothing to add to the "sound and pellucid opinion of the district court." *Id.* at 2a.

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[3] The court found it unnecessary to decide under *Lemon* whether the practice challenged here had a secular purpose and avoided excessive entanglement between government and religion. See Pet. App. 23a.

Judge Bownes concurred. Pet. App. 3a-13a. Writing separately, he concluded that the ceremonial invocations and benedictions were impermissible under each part of the three-part *Lemon* analysis. Pet. App. 9a-10a. Like the district court, Judge Bownes dismissed this Court's decision in *Marsh* as inapposite. *Marsh*, according to Judge Bownes, "was based on the 'unique' and specific historical argument that the framers did not find legislative prayers offensive to the Constitution because the First Congress approved of legislative prayers." *Id.* at 11a. *Marsh* did not apply here "since free public schools were virtually nonexistent at the time the Constitution was adopted." Pet. App. 11a (quoting *Edwards* v. *Aguillard*, 482 U.S. 578, 583 n.4 (1987)). Unlike the district court, Judge Bownes did not believe that public ceremonial invocations and benedictions would be permissible if they omitted any reference to a deity. Invocations and benedictions, in his view, "are by their very terms prayers and religious." Pet. App. 13a.

Judge Campbell dissented from what he considered "the[] extreme views of [his] colleague[s]." Pet. App. 14a. He did not believe that the Constitution prohibits "message[s] * * * especially suitable for a rite of passage like a graduation, where those present wish to give deeply felt thanks." *Ibid.* Instead, he found that "*Marsh* and *Stein* provide a reasonable basis for a rule allowing invocations and benedictions on public, ceremonial occasions," so long as school authorities invited speakers representing a wide range of religious beliefs and ethical philosophies. *Id.* at 16a.

SUMMARY OF ARGUMENT

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court formulated a three-part inquiry to assess an Establishment Clause challenge to government programs providing financial aid to sectarian institutions. Since then, the Court has applied the *Lemon* "test" outside of the context in which it was fashioned. The test has come to

be used, *inter alia*, to assess Establishment Clause challenges to civic acknowledgments of our religious heritage in public life. The result has been pervasive confusion in the lower courts and persistent division on this Court.

The Court has not, however, invariably hewn to the *Lemon* formula. The Court avoided reliance on *Lemon* in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), where the Court upheld daily prayer in a state legislature, based on similar traditions reaching back to the framing of the Constitution. On other occasions, the Court has warned against overreliance on *Lemon* in this "sensitive area." *Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984). Indeed, a majority of the members of this Court, recognizing the confusion that *Lemon* has spawned, has on separate occasions advocated significant revision or abandonment of the *Lemon* test.[4]

This case offers the Court the opportunity to replace the *Lemon* test with the more general principle implicit in the traditions relied upon in *Marsh* and explicit in the history of the Establishment Clause. That principle focuses on the overriding concern of the Religion Clauses—the assurance of religious liberty—and holds that civic

[4] *E.g.*, *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order."); *Edwards* v. *Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation * * * of the totality of *Lemon* is particularly applicable to the 'purpose' prong"); *Wallace* v. *Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, [and] is difficult to apply and yields unprincipled results"); *Aguilar* v. *Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test" of *Lemon*); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment) ("I am no more reconciled now to *Lemon I* than I was when it was decided. * * * The threefold test of *Lemon I* imposes unnecessary, and * * * superfluous tests for establishing [a First Amendment violation].").

acknowledgments of religion in public life do not offend the Establishment Clause, as long as they neither threaten the establishment of an official religion nor coerce participation in religious activities.

This liberty-focused principle recognizes that, in the early years of the Republic, all three branches of government welcomed devotional exercises to inaugurate their official business. The Founding Fathers encouraged this practice; they saw no inconsistency between ceremonial acknowledgments of the country's religious heritage and the Establishment Clause. Indeed, the Constitution they framed permits acknowledgment of religion as an inherent part of the ceremony that lies at the heart of the civic life of the Republic. The Oath Clauses contemplate that officials of the United States and of the several States may undertake an inherently religious act —swearing an oath—when they pledge to uphold the laws and Constitution of the United States. U.S. Const. Art. II, § 1, Cl. 8; Art. VI, Cl. 3. As these provisions and other historical evidence show, the practice of the early Republic cannot be dismissed as a desultory gesture undertaken without attention to constitutional theory. A proper theory of the Establishment Clause must therefore embrace the validity of this practice and its modern counterparts, rather than treating them as anomalies. The proper approach recognizes that in this setting coercion is the touchstone of an Establishment Clause violation.

This approach accords with the language and history of the Establishment Clause. As its text makes plain, the Establishment Clause was adopted to prevent the establishment of an official religion. Established religions were the rule in the Old World; they were established and maintained through laws that compelled payment of taxes and obedience to the tenets of the favored church. The Framers who adopted the Establishment Clause plainly did not consider civic participation in ceremonial acknowledgments as abridging religious liberty or threatening to establish an official religion.

The Framers who sanctioned civic acknowledgment of religion on occasions momentous to the Nation—such as presidential inaugurations, sessions of Congress, and sessions of this Court—can hardly have intended to bar it on more mundane occasions, such as public school graduations. Yet such a two-tiered system is nonetheless developing from the effort to follow both the approach in *Marsh* and the *Lemon* test. The tension can be resolved, and coherence in this area restored, by an approach that focuses on whether religious liberty is implicated by the challenged practice.

Under such a liberty-focused principle, the practice challenged in this case should be sustained. We recognize that consideration whether a particular practice infringes upon religious liberty should be undertaken with especial care when the practice occurs in the classroom setting. No level of heightened scrutiny, however, should be triggered merely because a challenge involves a ceremony that children might attend. The graduation setting at issue here differs markedly from the classroom setting. In the classroom, the school carries out an avowedly instructional mission, and school officials are the sole authority figures. Graduations, in contrast, are ceremonial affairs, and the parents themselves are present to act as a natural bulwark against risk of official coercion. Because graduations are designed not only for students but also for their families and friends, the graduation setting does not warrant an approach different from that applied in other ceremonial settings. Children may well be present when invocations and benedictions are delivered at inaugurations and similar state ceremonies. Those religious acknowledgments often will be similar to those typically delivered at graduations. It would make no sense to hold that this Court could open its sessions with an invocation of the Deity that could not be delivered at a public school graduation.

ARGUMENT

1. Nothing in the text of the Establishment Clause or in the concerns leading to its adoption suggests that a ceremonial acknowledgment of religion is a "law respecting an establishment of religion." On the contrary, history shows that religious acknowledgments were part of the ceremonies of all three branches of government when the Republic was founded. Indeed, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984). The Founders encouraged civic recognition of the Nation's religious heritage; they did not believe that the practice threatened religious liberty by establishing an official religion or coercing participation in religious activities. It therefore did not implicate the prohibition embodied in the Establishment Clause.

a. In the early Republic, all three branches of government included religious acknowledgments on ceremonial occasions. "[H]istory is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch* v. *Donnelly*, 465 U.S. at 675. That history is particularly telling since the government of the new Republic was dominated by the Founders. See *Marsh*, 463 U.S. at 790 (citing *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).[5]

The early Presidents all included invocations of God in their inaugural addresses. Those invocations have previously been reproduced in decisions of this Court and therefore need not be reiterated in their entirety here. *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring

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[5] See also *Myers* v. *United States*, 272 U.S. 52, 174-175 (1926) (the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument").

in the judgment and dissenting in part); *Engel* v. *Vitale*, 370 U.S. 421, 446 n.3 (1962) (Stewart, J., dissenting). It is useful to note, however, that Thomas Jefferson—often cited as an advocate of strict separation between church and state (and author of the decidedly extratextual "wall of separation" metaphor)—explicitly invoked divine blessing in his second inaugural address.[6] In addition, Presidents Washington, Adams, and Madison all issued proclamations recommending prayers of

[6] On March 4, 1805, President Jefferson ended his second inaugural address as follows:

> I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measure that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

1 *Messages and Papers of the Presidents, 1789-1897* at 382 (J. Richardson ed. 1897). This is not the only evidence that casts doubt on latter-day characterizations of Jefferson as a strict separationist. Further evidence is supplied by his approval of treaties sending ministers to the Indians. See R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 261-270 (1982). In addition, when Jefferson participated in revising Virginia's legal code, he sponsored or drafted a number of bills that demonstrated a much greater willingness to accommodate religion in public life than is suggested by the single piece of state legislation for which he is generally known, the Bill for Establishing Religious Freedom. See generally Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C.L. Rev. 159 (1990); Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1585-1586 (1989). Indeed, much of Jefferson's concerns about the national government's involvement in religion stemmed from his deep-seated conviction that the role of the central government should be limited as a general matter, reserving to the States matters that might touch on the sphere of religion.

thanksgiving. *Lynch*, 465 U.S. at 675 & n.2.; see also 1 *Messages and Papers of the Presidents, 1789-1897*, at 64, 268-270, 284-286, 513, 532-533, 559 & 560-561 (J. Richardson ed. 1897); 3 A. Stokes, *Church and State in the United States* 180-193 (1950).

The early Congresses likewise encouraged acknowledgments of religious heritage both within and without their halls. Prior to adoption of the Constitution, the Continental Congress opened its sessions with a prayer offered by a paid chaplain. See *Marsh*, 463 U.S. at 787. After the Framing, and "[i]n the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate." *Lynch*, 465 U.S. at 674.[7] The First Congress also requested that the President recommend to the people a day of prayer. 1 Annals of Cong. 949-950 (J. Gales ed. 1789).

Nor was the federal judiciary out of step with its coordinate branches in this respect. To the contrary, the Article III branch early on adopted a tradition of ceremonial acknowledgment of religion. Contemporary reports show that the phrase "God Save this Honorable Court" became part of the traditional opening of the Court's sessions at least as early as the Court of Chief Justice Marshall. C. Warren, *The Supreme Court in United States History* 469 (1922). Still earlier, the first Chief Justice, John Jay, invited members of the clergy to open sessions of the circuit court held in New England with a prayer. Letter of John Jay to Richard Law (Mar. 10, 1790), *reprinted in* 2 *The Documentary History of the Supreme Court of the United States: The Justices on Circuit, 1789-1800*, at 13-14 (M. Marcus ed. 1988). Thereafter, clergymen delivered prayers during circuit

[7] One of the Congressmen appointed to draft the legislation providing for chaplains to be paid was James Madison, who, like Jefferson, is often mentioned as a champion of absolute separation between government and religion. *Marsh*, 463 U.S. at 788 n.8.

court on a regular basis, including on one occasion when the Vice President was in attendance, see 2 *The Documentary History of the Supreme Court of the United States: The Justices on Circuit, 1790-1794*, at 276-277 (M. Marcus ed. 1988) (quoting article in *Columbian Centinel* (Boston), May 16, 1792), and on several occasions in Providence, Rhode Island, see *id.* at 496 (reprinting article of Nov. 8, 1794, in the *Providence Gazette*).

These ceremonial acknowledgments were so pervasive among the three branches that it is fair to say they constituted a regular practice of our early government. It would be modern-day arrogance in the extreme to dismiss that practice as the result of unthinking prejudice or political expedience on the part of the Founding generation. To the contrary, the Framers' approval of acknowledgments of the country's religious heritage was the product of deliberate reflection on the relation between religion and civic life. The Framers were aware that the country had been founded by "settlers [who] came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches," *Everson* v. *Board of Education*, 330 U.S. 1, 8 (1947), and were acutely concerned to avoid such persecution in the new republic. See also *Edwards* v. *Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring) ("The early settlers came to this country from Europe to escape religious persecution that took the form of forced support of state-established churches."). The Framers simply did not regard acknowledgment of religion on ceremonial occasions as presenting the sort of dangers they determined to avoid by adopting the Establishment Clause.[8] What is abundantly clear is that the distinctly latter-day claim of "sanitized separation between Church and State," *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973), was alien to the Founding generation's vision of the Establishment Clause. That Clause was designed, above all, to protect religious liberty, not to expunge religion from the Nation's official life.

[8] See also Northwest Ordinance of 1787, Art. III ("Religion, morality, and knowledge being necessary to good government, schools and means of education shall ever be encouraged."), reenacted as Northwest Ordinance of 1789, ch. 8, § 1, 1 Stat. 50, 52.

b. The Framers made explicit in the Constitution their belief that acknowledgment of religious devotion was entirely consistent with the civic order provided for in that document. The Oath Clauses approve of the Nation's leaders publicly undertaking a religious duty when they undertake the most solemn constitutional duty—pledging fidelity to the laws and Constitution of the Republic.[9]

The term "oath," as used in these clauses, referred to the invocation of God as a witness to the expression of an obligation: in short, a sacred vow.[10] In discussing

[9] Article II, § 1, Cl. 8, declares:

> Before he enters on the Execution of his Office, [the President] shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Article VI, Cl. 3, declares:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

[10] See D. Walker, *The Oxford Companion to Law* 896 (1980) (oath is "[a]n assertion or promise made in the belief that supernatural retribution will fall on the taker if he violates what he swears to do. The custom of an oath as sacred and binding is ancient and widespread."); A. English, *A Dictionary of Words and Phrases Used in Ancient and Modern Law* 579 (1899) (oath is an "assurance by appeal to God, that a statement is true"); 2 S. Johnson, *A Dictionary of the English Language* (1755) (oath is "[a]n affirmation, negation, or promise, corroborated by the attesta-

the Article VI Oath Clause at North Carolina's ratifying convention, James Iredell, later a Justice on this Court, defined an oath as a "solemn appeal to the Supreme Being for the truth of what is said by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which will bind his conscience most." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 196 (J. Elliot 2d ed. 1836).[11] George Washington's actions at the first inauguration confirm that compliance with the Oath Clauses occasioned acts of religious significance at civic ceremonies. When Chancellor Robert Livingston requested Washington to take the prescribed oath of office, Washington responded as follows (6 D.S. Freeman, *George Washington* 192 (1954)):

> "I solemnly swear" Washington answered and repeated the oath. Reverently he added, "So help me God." He bent forward as he spoke and before Otis could lift the Bible to his lips, he kissed the book.[12]

tion of the Divine Being"); T. Blount, *Nomo-Lexicon: A Law-Dictionary* (1670) ("Oath (*Juramentum*) is a calling Almighty God to witness that the Testimony is True; * * * a Holy Band, a sacred Tye, or Godly Vow.").

[11] At the time of the Framing, it was similarly understood that oaths before the court imposed a religious duty as well as a civic duty. Chief Justice John Jay, while riding circuit, instructed jurors that witnesses were to swear their oaths under "those solemn obligations which an appeal to the God of Truth impose." As for the jurors themselves, Chief Justice Jay said, "[Y]our Oath superadds new and solemn Obligations to those which result from the Laws of Morality." *John Jay's Charge to the Grand Jury of the Circuit Court for the District of Vermont* (June 25, 1792), *reprinted in* 2 *The Documentary History of the Supreme Court of the United States: The Justices on Circuit, 1790-1794*, at 284, 285 (M. Marcus ed. 1988).

[12] The Oath Clauses also reflect the Framers' dedication to freedom of conscience and the corresponding need for civic accommodation of varying beliefs. The Oath Clauses provide that office holders may bind themselves by affirmation rather than oath. This option was afforded not for the irreligious who might not accept

c. As its text makes plain, the purpose of the Establishment Clause is to prohibit the establishment of an official religion. History shows that the Clause was adopted to guard against establishments of religion of the sort that prevailed in Great Britain and throughout Europe and that caused many to flee to this country. Religions were established in the Old World through laws that compelled both payment of taxes to support the favored religion and obedience to that religion's tenets.[13] Because force and funds were the twin evils that animated the drafters of the Establishment Clause, it should come as no surprise that these same drafters deemed ceremonial acknowledgments of religion, which posed no such dangers to religious liberty, to be fully compatible with the Constitution.

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the religious significance of an oath, but for those whose religious scruples precluded such a solemn invocation for worldly ends. Adams & Emmerich, *supra*, 137 U. Pa. L. Rev. at 1630-1633; J. Story, *Commentaries on the Constitution* § 1838, at 703 (1985 reprint of 1833 ed.) (Oath Clause of Article VI "permitted a solemn affirmation to be made instead of an oath" because some denominations were "conscientiously scrupulous of taking oaths"). The provision permitting an affirmation in lieu of an oath was no doubt drawn from similar provisions in state constitutions, many of which explicitly included such a provision to accommodate religious beliefs. The Maryland Constitution of 1776, for example, provided:

> That the manner of administering an oath to any person, ought to be such, as those of the religious persuasion, profession, or denomination of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being. And that the people called Quakers, those called Dunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to take their solemn affirmation * * *.

Md. Const. of 1776, Declaration of Rights, Art. XXXVI, *quoted in* Adams & Emmerich, *supra*, 137 U. Pa. L. Rev. at 1631.

[13] *Edwards* v. *Aguillard*, 482 U.S. at 605 (Powell, J., concurring); *Everson* v. *Board of Education*, 330 U.S. at 8; L. Levy, *The Establishment Clause* 4-8 (1986); Adams & Emmerich, *supra*, 137 U. Pa. L. Rev. at 1620-1622.

In examining the history of the Establishment Clause, this Court has relied on historical evidence concerning the views of Madison and Jefferson. See, *e.g.*, *Edwards* v. *Aguillard*, 482 U.S. at 605-606 (Powell, J., concurring); *Engel* v. *Vitale*, 370 U.S. 421, 428, 431-432 nn. 13-16, 436 n.22 (1962); *Everson* v. *Board of Education*, 330 U.S. at 12, 33-34.[14] In particular, the Court has focused on their roles in the struggle for religious freedom in Virginia, which occurred over the decade that preceded adoption of the Constitution. See, *e.g.*, *Edwards* v. *Aguillard*, 482 U.S. at 606 (Powell, J., concurring).[15] This evidence shows that compelled taxation and forced religious observance were the dangers to religious liberty that the Establishment Clause was intended to avert.

The culmination of Madison's efforts in Virginia was his Memorial and Remonstrance against Religious Assessments. See *Everson* v. *Board of Education*, 330 U.S. at 63-72 (reproducing Madison's Memorial and Remonstrance). Madison drafted the Memorial and Remonstrance to oppose a legislative proposal to tax all Virginia citizens to support teachers of the Christian religion. *Edwards* v. *Aguillard*, 482 U.S. at 606 (Powell, J., concurring). See generally L. Levy, *The Establishment Clause* 55-58, 101-104 (1986). In Madison's own words, the document was founded on the fear that the proposed bill would be a "dangerous abuse of power" if "armed with the sanc-

[14] But see *Wallace* v. *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting) ("Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the States. * * * He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.").

[15] See generally Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C.L. Rev. 159, 173 nn. 77-78 (1990); Comment, *The Supreme Court, The First Amendment and Religion in the Public Schools*, 63 Colum. L. Rev. 73, 79 (1963).

tions of a law." 8 *The Papers of James Madison* 298 (1973) (Memorial and Remonstrance). Setting forth reasons for opposing the bill, Madison emphasized its coercive aspect. For example, the first reason advanced by Madison was that the bill violated

> the fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, *not by force or violence*."

Id. para. 1 (emphasis added). "[C]ompulsive support" of religion, he stated, is "unnecessary and unwarrantable." *Id.* para. 3. He also warned that "attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general." *Id.* para. 3. In sum, Madison identified a law that established religion as one that coerced support of, or participation in the tenets of, a particular religion.[16] These—not acknowledgments of our religious heritage—represented the threats to religious liberty against which both the Establishment Clause and the Free Exercise Clause were aimed.

So it was that, in the wake of the Memorial and Remonstrance, the bill for supporting teachers of Christianity was defeated. L. Levy, *supra*, at 58; Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 854 (1986). In its place, Virginia enacted Jefferson's Act for Establishing Religious Freedom. The central injunction in Jefferson's leg-

[16] In the Memorial and Remonstrance, Madison refers to the "establishment proposed by the bill", its "ecclesiastical establishment," and the "proposed establishment." Similarly, in a letter to James Monroe regarding the bill, Madison entitled it the "Bill for Establishing the Christian Religion in this State." Letter of James Madison to James Monroe (June 21, 1785), 8 *The Papers of James Madison* 306 (1973), *quoted in* L. Levy, *supra*, at 102. The bill itself was entitled "A Bill Establishing a Provision for Teachers of the Christian Religion." See *Everson* v. *Board of Education*, 330 U.S. at 72-74 (supplemental appendix).

islation echoed the "fundamental truth" on which Madison's Memorial and Remonstrance was based:

> [T]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

12 Hening's Stat. 86 (W. Hening ed. 1823). From these words it seems clear that to Jefferson, like Madison, the essence of an establishment of religion was some form of legal coercion that, by its nature, negated religious liberty.

Madison's remarks during congressional debates on the proposed language of the Establishment Clause sound the same theme that he and Jefferson had voiced in Virginia. The congressional debate was reviewed at length in then-Justice Rehnquist's opinion in *Wallace* v. *Jaffree*, 472 U.S. at 93-99, and we shall not rehearse that history in detail here. But this much is clear and powerfully on point: Madison stated that the proposed provision meant that "Congress should not establish a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." *Id.* at 95 (quoting 1 Annals of Cong. 730) (J. Gales ed. 1789) (emphases added). In identifying the concerns prompting the Clause, Madison said that "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." 472 U.S. at 96 (quoting 1 Annals of Cong. 731 (J. Gales ed. 1789) (emphasis added)). These, then, were the threats to religious freedom interdicted by the Establishment Clause.

d. This Court has consistently recognized that interpretation of the Establishment Clause must "comport[] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 473.[17] Indeed, the Court's "Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic,'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. at 777 n.33 (quoting *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921)).

As we have explained, history teaches that the Framers intended by the Establishment Clause to prohibit laws that threaten religious liberty by establishing religion or coercing participation in religious activities. The Court should confirm that the principle animating the Establishment Clause is to "forestall[] compulsion by law of the acceptance of any creed or the practice of any form of worship." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).[18]

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[17] See also *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

[18] The Court, we submit, should reconsider isolated statements in some later decisions to the effect that "proof of coercion" is "not a necessary element of any claim under the Establishment Clause." *Committee for Public Education* v. *Nyquist*, 413 U.S. at 786; see also *Abington School Dist.* v. *Schempp*, 374 U.S. at 222-223. The Court's first such statement was in *Engel* v. *Vitale*, 370 U.S. at 430 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion."). That statement was not necessary to the Court's decision in *Engel*, for the Court went on to observe: "This is not to say, of course, that [school prayers] do not involve coercion * * *. When the power, prestige, and financial support is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 430-431. Thus, *Engel* is fairly read to support only the limited proposition that proof of "direct * * * compulsion" is not required to demonstrate an Establishment

2. a. As government has expanded since the days of the early Republic and created new public institutions, new public ceremonies have naturally arisen. But these ceremonies nonetheless frequently include the same sort of religious acknowledgments that were approved in the early Republic. Invocations, benedictions, and other references to God are common now, just as they were at the Founding. A proper theory of the Establishment Clause should embrace the validity of these practices in contemporary ceremonial settings as well as in the context of more venerable ceremonies. See *Lynch* v. *Donnelly*, 465 U.S. at 674-678 (discussing "unbroken history" of religious acknowledgments in public life).

The problem, of course, is not the language or history of the First Amendment. The problem is *Lemon*. That is, rigorous application of *Lemon*'s tripartite test would invalidate ceremonial acknowledgments of religion in both contexts. Yet under *Marsh*, the *Lemon* test appears to have been discarded, at least with respect to religious acknowledgments in ceremonies whose ancestry dates back to the Framing. This state of affairs is breeding a two-tiered approach that threatens to yield inequitable results: a grandfather approach, evidenced by *Marsh*, available to participants in ceremonies specifically approved by the Framers, under which religious acknowledgments will generally be permitted; and the *Lemon* approach for participants in more modern (and arguably less momentous) ceremonies, under which the constitutionality of religious acknowledgments is at best uncertain.

The fact pattern in this case—delivery of an invocation and benediction at a public school graduation—

Clause violation. See generally McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). At the same time, the decision also suggests that proof of indirect coercion is, at a minimum, highly relevant. For reasons discussed in the text, we believe that in this context proof of some form of coercion is required.

illustrates the point. A court assessing a prayer in a civic setting first faces the threshold inquiry whether to apply *Lemon* or *Marsh*. The court of appeals here (adopting the district court's opinion) chose *Lemon*. Pet. App. 2a, 21a-26a. It reasoned that *Marsh* did not apply because public schools did not exist at the time of the Framing; since invocations in public schools were not a tradition approved in the early Republic, they could not be upheld under *Marsh*. *Id.* at 26a & n.8. In contrast, the court of appeals in *Stein* v. *Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), chose *Marsh*. The *Stein* court reasoned that the tradition of graduation invocations was sufficiently akin to legislative prayers to be governed by *Marsh*.

This characterization inquiry seems wholly misguided. The Nation's tradition of acknowledging its religious heritage is not a series of discontinuous events at isolated institutions—some old and protected, some new and vulnerable—but a complex tapestry of civic culture, with one strand of tradition naturally leading to another as one institution arises from another. Thus, that there were no prayers at public school graduations at the time of the Framing cannot sensibly dispose of their constitutional validity, any more than the fact that there were no airplanes at the time of the Framing could dispose of a Commerce Clause challenge to state restrictions on air travel.

Under current precedent, once courts select the *Lemon* test, they face another question: whether to apply the test with a historical gloss. To do so accords with the approach of *Lynch*, in which the Court upheld the constitutionality of a public creche display because it had no greater effect of advancing religion than did other religious symbols and practices in the Nation's civic life. 465 U.S. at 668. That avowedly comparative approach may avoid the stark anomalies often produced by an application of *Lemon* that is not informed by history. However, determining whether one practice advances re-

ligion more than another is measuring without an objective ruler.[19] Courts attempting to fashion such a ruler have inevitably devised a theological measure to distinguish, for instance, between a menorah and a creche. See *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573 (1989). Thus, the attempt to repair the "effects" prong of the *Lemon* test to take account of history mocks the "entanglement" prong by leading the judiciary into minute scrutiny of the content and context of religious practices.[20]

The liberty-focused inquiry we suggest properly shifts the focus away from an evaluation of the religious practice to an assessment of the autonomy of the observers of the practice. The approach thereby guides courts away from the treacherous shoals of religious doctrine and symbolism, cf. *County of Allegheny*, 492 U.S. at 665-666 (Kennedy, J., dissenting), to the more familiar judicial shores of liberty, on the one hand, and compulsion and constraint, on the other.[21] To be sure, the ques-

[19] See Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch *v.* Donnelly, 1984 Duke L.J. 770, 783-787.

[20] Justice O'Connor has suggested replacing the "effects" prong of the *Lemon* test with an inquiry into whether the religious practice or symbol endorses religion. See, *e.g.*, *Lynch*, 465 U.S. at 687-694 (O'Connor, J., concurring). We believe, with all respect, that assessing the degree to which a prayer delivers an impermissible message of endorsement leads to many of the same difficulties as measuring religious "effects." See *Harris* v. *City of Zion*, 927 F.2d 1401, 1419, 1423 (7th Cir. 1991) (Easterbrook, J., dissenting) ("What *is* endorsement in a world pervaded by religious imagery, from the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian Trinity) to "In God We Trust" on the coinage to Thanksgiving Day (to whom are thanks being given?) to the religious stamps the Postal Service issues at Christmas and Easter to the names of our cities (Los Angeles, San Francisco, Corpus Christi) and submarines.").

[21] The issue of coercion is raised in many areas of constitutional law. *See, e.g.*, *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1251-1253 (1991) (determining whether a confession was given free of coercion); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (determining whether consent for a search was given free from coercion).

tion whether a challenged practice is coercive may not always be easy to answer. The question will not, however, entangle the courts in a divisive and often fruitless assessment of religious doctrine and symbols. In this respect, the liberty-focused inquiry represents a significant advantage over current doctrine.

b. Our suggested approach accords with this Court's longstanding recognition that accommodation by the government of the religious beliefs of its citizens "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). The Framers contemplated such efforts and encouraged them: "The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970). The Constitution thus provides breathing space between the mandate of the Free Exercise Clause and the prohibition of the Establishment Clause within which government can accommodate religious expression or practice. That is *Marsh*'s basic analytic insight.

The spirit of accommodation provided for in the Constitution is as essential to the vitality of civic life today as it was in the early Republic. That spirit should thus not only inform the assessment of religious invocations during inaugurations and sessions of Congress and this Court; it should be honored throughout the broad sphere in which modern government operates—including in institutions that were once wholly or predominantly in the private sector.

This case illustrates the wisdom of this Court's teaching that government's proper role is one of "benevolent neutrality" toward religion, in which "there is room for play in the joints." *Walz* v. *Tax Commission*, 397 U.S.

at 669. Parents and children gathered at Nathan Bishop, as millions do throughout the country every year, to celebrate an important rite of passage in modern society—graduation from school. For many, religion has provided the inspiration that guides both parent and child through the inevitable difficulties of adolescence; for many, too, religion provides a framework that gives coherence and meaning to the search for knowledge. For these people, to refuse to acknowledge their beliefs through some brief, symbolic act such as Rabbi Gutterman's invocation and benediction would be to falsify their experience and fundamentally distort the meaning of the ceremony.

3. The demonstrated shortcomings of the *Lemon* test counsel against attempting to reduce analysis under the Establishment Clause to a single, complicated formula. In our view, the precise contours of a liberty-focused inquiry should accordingly be limned through case-by-case adjudication. Nonetheless, we also believe that, when the inquiry is undertaken for the present case, it leads to the conclusion that ceremonial acknowledgments of religion in civic life do not, as a general matter, offend the Establishment Clause.

a. A liberty analysis focuses on the autonomy of the individual who is in a position to perceive the expression. Coercion enters the picture when—in connection with an acknowledgment of religion that by itself is noncoercive—an individual is required to participate in religious activities. That conclusion follows from the principle that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

For the same reason, a person cannot be compelled to listen to a religious acknowledgment. That may be inferred from this Court's decision in *Zorach* v. *Clauson*, *supra*. There, the Court upheld a release-time program,

which permitted students to leave public school to receive religious instruction. *Zorach* v. *Clauson*, 343 U.S. at 312-314. In so holding, the Court emphasized the fact that students were not compelled to attend the religion classes. *Id.* at 311. Under those circumstances, the program did not exert any coercive influence on the students who chose not to avail themselves of the "released time" program. Instead, it simply "respect[ed] the religious nature of our people and accommodate[d] the public service to their spiritual needs." *Id.* at 314. Similarly, an individual is not coerced by a civic acknowledgment of religion so long as that person is not required to witness it.[22]

A voluntary decision not to witness a civic acknowledgment of religion, however, cannot be considered a response to coercion. Analysis under the Establishment Clause, like similar inquiries under other constitutional provisions, should be guided by common-sense respect for individual free will. Cf. *Schneckloth* v. *Bustamonte*, *supra*. The Framers set an example of common sense in this area. They welcomed legislative prayer and other ceremonial acknowledgments of religion, even though they were undoubtedly aware that individual legislators or others might choose to be absent during them. The Framers' acceptance of ceremonial acknowledgments presupposed some minimal degree of individual tolerance that should govern modern assessments of religious acknowledgments.[23] Viewed in that framework, for ex-

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[22] While Justice Jackson dissented from the result in *Zorach* v. *Clauson*, he did so because, in his view, "[the] released time program [was] founded upon a use of the State's power of *coercion*, which, for [him], determine[d] its unconstitutionality." 343 U.S. at 323 (emphasis added).

[23] During discussions at the First Constitutional Convention about whether to open sessions with a prayer, Samuel Adams met objections to such a practice by stating that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." C. Adams, *Familiar Letters of John Adams and His Wife, Abigail Adams,*

ample, a decision not to be present for a graduation invocation and benediction does not demonstrate the existence of coercion. Under the Free Exercise and Free Speech Clauses, citizens are inevitably exposed to a volley of views that may give offense and that they may chose to ignore. Cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 72-74 (1983); *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 208-212 (1975).

Common sense should likewise guide the evaluation of any costs entailed in civic acknowledgments of religion. The expenditure of nominal amounts should not suffice to demonstrate an Establishment Clause violation. Cf. *Lynch*, 465 U.S. at 684 (cost of maintaining creche was *de minimis*). Here, too, history confirms what common sense suggests. Virtually every civic acknowledgment involves some expense—if only, for example, a portion of the salary of the officer who opens this Court's sessions with an invocation. That does not warrant abrogation of the practice. On the other hand, public expressions of the Nation's religious heritage could be sufficiently expensive to implicate the Establishment Clause's prohibition of "substantial taxes to support religious exercises," *Everson* v. *Board of Education*, 330 U.S. at 11. Cf. *Bowen* v. *Kendrick*, 487 U.S. 589, 620-622 (1988) (public funds provided to organizations for adolescent family planning services cannot be used for religious activities).

b. We recognize that this Court's Establishment Clause decisions evince a special solicitude for young children. *E.g.*, *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 383 (1985). Our analysis is compatible with this aspect of the case law in cases involving the classroom setting. In that setting, young children may be susceptible to influences that might be deemed indirectly coercive. Thus,

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during the Revolution 37-38 (1964), *quoted in Marsh*, 463 U.S. at 792.

heightened sensitivity may be warranted when evaluating the factors described above.[24]

In any event, no special rule for children is justified in the setting of a public school graduation or in any other ceremonial setting where children may compose part of the audience. The law generally does not create special rules to protect children from outside influences that their parents or guardians are in a position to counter. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (invalidating the postal service's regulations on contraceptive advertisements because parents can control access to the mailbox).[25]

Moreover, a special rule for ceremonies that children might attend would threaten to swallow the general rule. For example, children often witness national events such as inaugurations—if not in person, then through radio or television. That is entirely proper, indeed laudable, for fledgling citizens and future leaders. It is doubtful that an invocation delivered by a local clergyman poses greater risk of coercion than an inaugural address that includes a prayer by the President.

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[24] But cf. *Engel*, 370 U.S. at 435 n.21, where the Court, while invalidating state-sponsored and officially composed classroom prayer, emphasized that

> [t]here is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

[25] The Court's Establishment Clause cases reject the notion that students are always susceptible to indoctrination. See *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1971).

c. The practice challenged here does not have any of the elements of coercion previously identified. Rabbi Gutterman's invocation and benediction for Nathan Bishop's ceremony were plainly mere acknowledgments of a belief in God. Students were not compelled to attend the ceremony, and those who attended were not forced to participate in any religious activity. It is not asserted that any more than a nominal amount of public money was spent on Rabbi Gutterman's portion of the ceremony. Under the analysis that we propose, the practice should be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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